

A SERUAN GEMILANG MAKMUR SDN BHD v. KERAJAAN
NEGERI PAHANG DARUL MAKMUR & ANOR

FEDERAL COURT, PUTRAJAYA

ARIFIN ZAKARIA CJ

AHMAD MAAROP FCJ

B RAMLY ALI FCJ

ZAHARAH IBRAHIM FCJ

AZIAH ALI JCA

[CIVIL APPEAL NO: 01(i)-15-04-2014(C)]

2 FEBRUARY 2016

C

CIVIL PROCEDURE: *Striking out – Statement of claim – Action to impeach or set aside earlier judgment – Serious conflict on material facts relating to issues of fraud – Whether there were issues of law requiring mature consideration during trial – Res judicata – Whether applicable – Whether action obviously unsustainable – Whether frivolous, vexatious and an abuse of court process – Whether perjured evidence a ground on which judgment may be impeached by virtue of s. 44 of Evidence Act 1950 – Rules of Court 2012, O. 18 r. 19*

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CIVIL PROCEDURE: *Judgments and orders – Party seeking to impeach or set aside earlier judgment on allegation of fraud – Res judicata – Whether applicable – Whether valid cause of action – Whether frivolous, vexatious and an abuse of court process – Whether perjured evidence a ground on which judgment may be impeached by virtue of s. 44 of the Evidence Act 1950*

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The appellant filed an action against the respondents regarding a claim which was related to a forest concession of 10,000 acres awarded to the United Malay National Organisation (UMNO) Pahang ('the 2002 suit'). The appellant had been granted approval by the second respondent to extract timber under the said concession. However, the appellant claimed that the second respondent failed or neglected to prevent the extraction of timber by third parties trespassing into the said concession area. As a result of the

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second respondent's breaches, the appellant claimed to have suffered losses amounting to a sum of RM36,339,030. The trial judge ruled in favour of the appellant and entered judgment against the respondents whereby the respondents were ordered to pay the appellant a sum of RM37,127,471.60.

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The Court of Appeal dismissed the respondents' appeal, and the respondents' application for leave to appeal to the Federal Court was also dismissed. Subsequently, the respondents initiated a fresh action against the appellant to impeach and set aside the earlier judgment on the premise that the said judgment was entered into as a result of fraud or perjured evidence by the appellant's witness based on fresh evidence which could not have been

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obtained and adduced at the earlier trial. The basis of the respondents' action was as clearly stated in paras. 22-29 of the statement of claim. The appellant

subsequently filed an application to strike out paras. 22-29 of the statement of claim under O. 18 r. 19 of the Rules of Court 2012 ('ROC'). In dismissing the application, the trial judge held that (i) based on the reliefs prayed for by the respondents, the issues of *res judicata* or *functus officio* did not arise on the basis of trite law that an application to impeach or set aside a judgment on the ground of fraud can be made by way of a fresh action and the court has jurisdiction to hear it; (ii) that an allegation of fraud must be proved by way of evidence to be adduced during trial and if satisfactorily proven, the impugned judgment could be impeached or set aside; and (iii) that the relevant documents relating to the fraud, as alleged by the respondents, were considered as new or fresh evidence which were not available to the respondents, at the time of the trial of the 2002 suit. The decision of the High Court was affirmed by the Court of Appeal. Leave to appeal to the Federal Court was granted on the following two questions (i) whether the test in *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* applies to an application to strike out an action brought to impeach a judgment based on intrinsic fraud or whether a different threshold could be applied ('Question 1'); and (ii) whether intrinsic fraud including perjured evidence was a ground in which a judgment of a court of competent jurisdiction may be impeached by virtue of s. 44 of the Evidence Act 1950 ('the Act') ('Question 2').

Held (dismissing appeal with costs)

Per Ramly Ali FCJ delivering the judgment of the court:

- (1) There is serious conflict on material facts particularly relating to issues on the existence of fraud and whether the fresh evidence could not have been obtained with reasonable diligence to be adduced during the previous trial. This conflict could only be resolved by subjecting the deponents of the various affidavits to cross-examination and/or calling other witnesses whose evidence could only be evaluated by the court after seeing and hearing them. The question as to whether the fraud referred to in s. 44 of the Act speaks about 'intrinsic or extrinsic' fraud is an issue of law that requires lengthy argument and mature consideration at trial. It was not part of the court's function at this stage of the litigation to decide difficult questions of law. (paras 44 & 56)
- (2) Paragraphs 22-29 of the respondents' statement of claim had sufficiently pleaded all the relevant particulars or elements to set for trial an action to impeach or set aside the earlier judgment as stated earlier either on the ground of fraud or on the ground of fresh/new evidence. The action was based on a valid cause of action recognised by law. Therefore, the respondents' action as well as the issue of fraud as pleaded therein, could not be said to be frivolous, vexatious and an abuse of the process of the court. Further, the doctrine of *res judicata* was not applicable in an action to impeach or set aside an earlier judgment which had been obtained by fraud. (paras 55 & 57)

- A (3) The ‘obviously unsustainable’ test adopted by *Bandar Builder* would ensure fair trial and access to the court to litigants. The respondents should be given their day in court to prove their case. The court should not strike out an action purely or for the simple reason that it was ‘unsustainable’. The degree of ‘unsustainability’ must be higher *ie*, it must be ‘obviously unsustainable’ before the action could be struck out summarily. The High Court and the Court of Appeal were right in holding that the respondents’ action was not obviously unsustainable and dismissed the appellant’s application for striking out. Based on the reasons adumbrated above, Question 1 and Question 2 were answered in the affirmative (paras 58, 59 & 60)
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Bahasa Malaysia Headnotes

- Perayu memfailkan satu tindakan terhadap responden-responden berkenaan tuntutan bagi konsesi hutan seluas 10 ekar yang diawardkan kepada United Malay National Organisation (UMNO) Pahang (‘guaman 2002’). Perayu diberikan kelulusan oleh responden kedua untuk mengekstrak kayu balak di bawah konsesi tersebut. Perayu mendakwa bahawa responden kedua gagal atau cuai untuk menghalang pengekstrakan kayu oleh pihak ketiga yang mencero bohi kawasan konsesi tersebut. Akibat pelanggaran responden kedua, perayu mendakwa telah mengalami kerugian berjumlah RM36,339,030. Hakim bicara memutuskan berpihak pada perayu dan memasukkan penghakiman terhadap responden-responden di mana responden-responden diperintahkan membayar RM37,127,471.60 kepada perayu. Mahkamah Rayuan menolak rayuan responden-responden, dan permohonan responden-responden untuk kebenaran merayu ke Mahkamah Persekutuan juga ditolak. Responden-responden kemudiannya memulakan tindakan baru terhadap perayu untuk mencabar dan mengetepikan penghakiman terdahulu atas alasan bahawa penghakiman tersebut dimasukkan akibat frod atau keterangan bersumpah bohong oleh saksi-saksi perayu berdasarkan keterangan baharu yang tidak dapat diperolehi atau dikemukakan semasa perbicaraan terdahulu. Dasar tindakan responden-responden dinyatakan dengan jelas dalam perenggan 22-29 pernyataan tuntutan. Perayu seterusnya memfailkan permohonan membatalkan perenggan 22-29 pernyataan tuntutan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah 2012 (‘KKM’). Dalam menolak permohonan, hakim bicara memutuskan bahawa (i) berdasarkan relif-relif yang dipohon oleh responden-responden, isu-isu *res judicata* atau *functus officio* tidak timbul berdasarkan undang-undang matan bahawa permohonan untuk mencabar atau mengetepikan penghakiman atas alasan frod boleh dibuat melalui tindakan baharu dan mahkamah mempunyai bidang kuasa mendengarnya; (ii) bahawa dakwaan frod harus dibuktikan melalui keterangan yang dikemukakan semasa perbicaraan dan jika dibuktikan dengan memuaskan, penghakiman yang dipersoalkan boleh didakwa atau diketepikan; dan (iii) bahawa dokumen relevan berhubungan frod, seperti yang didakwa oleh responden-
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responden, diambil kira sebagai keterangan baharu yang tidak boleh diperolehi oleh responden-responden, pada masa perbicaraan guaman 2002. Keputusan Mahkamah Tinggi disahkan oleh Mahkamah Rayuan. Kebenaran merayu ke Mahkamah Persekutuan diberikan berdasarkan dua soalan berikut (i) sama ada ujian dalam *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* diguna pakai dalam permohonan untuk membatalkan guaman yang dibawa untuk mendakwa penghakiman berdasarkan frod intrinsik atau sama ada nilai ambang berbeza boleh diguna pakai ('Soalan 1'); dan (ii) sama ada frod intrinsik termasuk keterangan bersumpah bohong adalah alasan di mana penghakiman mahkamah daripada satu bidang kuasa kompeten boleh didakwa berikutan s. 44 Akta Keterangan 1950 ('Akta') ('Soalan 2').

Diputuskan (menolak rayuan dengan kos)

Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

- (1) Terdapat konflik serius antara fakta-fakta material khususnya berhubung isu-isu kewujudan frod dan sama ada keterangan baharu tidak boleh diperolehi dengan keperihatinan yang munasabah untuk dikemukakan semasa perbicaraan dahulu. Konflik ini hanya boleh diselesaikan dengan menyoal balas deponen-deponen pelbagai affidavit atau memanggil saksi-saksi yang keterangannya hanya boleh dinilai oleh mahkamah selepas melihatnya dan mendengarnya. Persoalan sama ada frod yang dirujuk dalam s. 44 Akta adalah frod 'intrinsic atau extrinsic' adalah isu undang-undang yang memerlukan hujah panjang dan pertimbangan matang semasa perbicaraan. Ini bukan sebahagian fungsi mahkamah pada peringkat litigasi untuk memutuskan soalan-soalan undang-undang yang rumit.
- (2) Perenggan 22-29 pernyataan tuntutan responden-responden memplidkan butir-butir atau unsur-unsur relevan untuk persediaan perbicaraan tindakan mendakwa atau mengetepikan penghakiman terdahulu seperti yang dinyatakan sebelum ini sama ada atas alasan frod atau atas alasan keterangan baharu. Tindakan tersebut adalah berdasarkan kausa tindakan yang sah dan diakui undang-undang. Oleh itu, tindakan responden-responden serta isu frod yang diplidkan bukan remeh, menyusahkan dan satu salah guna proses mahkamah. Tambahan lagi, doktrin *res judicata* tidak boleh diguna pakai dalam tindakan untuk mendakwa atau mengetepikan penghakiman dahulu yang diperolehi melalui frod.
- (3) Ujian 'obviously unsustainable' yang diguna pakai oleh *Bandar Builder* akan memastikan perbicaraan adil dan untuk para litigan mempunyai akses ke mahkamah. Responden-responden harus diberikan peluang di mahkamah untuk membuktikan kes mereka. Mahkamah tidak patut membatalkan tindakan semata-mata atau atas alasan mudah bahawa ia 'unsustainable'. Darjah 'unsustainability' harus lagi tinggi iaitu harus 'obviously unsustainable' sebelum tindakan boleh dibatalkan serta-

- A merta. Mahkamah Tinggi dan Mahkamah Rayuan betul dalam memutuskan tindakan responden-responden jelas tidak boleh bertahan dan menolak permohonan pembatalan perayu. Berdasarkan alasan-alasan yang dikemukakan, Soalan 1 dan Soalan 2 dijawab secara afirmatif.
- B **Case(s) referred to:**
American Cyanamid Co v. Ethicon Ltd [1975] AC 396 (*refd*)
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (*refd*)
Attorney General of the Duchy of Lancaster v. London and North Western Railway Company [1892] 3 Ch 274 (*refd*)
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC (*refd*)
Birch v. Birch [1902] P 130 (*refd*)
Cheah Wong Nyan and Cheah Sin Kee v. KALRM Palaniappa & Ors [1934] 1 LNS 10 HC (*refd*)
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA (*refd*)
Cole v. Langford [1898] 2 QB 36 (*refd*)
- D *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18 PC (*refd*)
Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC (*refd*)
Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clard Ltd [1899] 1 QB 86 (*refd*)
Ladd v. Marshall [1954] 3 All ER 745 (*refd*)
Mahomed Golab v. Mahomed Sulliman [1894] ILR 21 Calc 612 (*refd*)
- E *McHarg v. Woods, Radio Pty Ltd* [1948] VLR 496 (*refd*)
Muktamala Dasi v. Ram Chandra De And Ors [1927] AIR Cal 84 (*refd*)
Patch v. Ward [1867] LR 3 Ch App 203 (*refd*)
Priestman v. Thomas [1884] 9 PD 270 (*refd*)
Satis Chandra Chatterji and Others v. Kumar Satish Kantha Roy And Others [1923] AIR PC 73 (*refd*)
- F *Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 (*refd*)
Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA (*refd*)
The Duches of Kingston's Case [1776] 2 Smith's LC (13th edn) 644 (*refd*)
Wyatt v. Palmer [1899] 2 QB 106 (*refd*)
- Legislation referred to:**
- G Evidence Act 1950, ss. 40, 41, 42, 44
National Land Code, s. 260(2)
Rules of Court 2012, O. 18 r. 19, O. 33 r. 3
Rules of the High Court 1980, O. 18 r. 19
- Other source(s) referred to:**
- H *Halsbury's Laws of England*, 4th edn, vol 26, para 561
For the appellant - Gopal Sri Ram (Rajoo Moorthy, Lua Ai Siew, Elyazura Md Shaarani & David Yii Hee Kiat with him); M/s Soo Thien Ming & Nashrah
For the respondents - Muhammad Shafee Abdullah (Ahmad Hanir Hambali & Noor Farhah Mustaffa SFCs with him); M/s Shafee & Co
- I [Appeal from Court of Appeal; Civil Appeal No: C-01(IM)-042-2010 (*affirmed*)]
Reported by Suhainah Wahiduddin

JUDGMENT

A

Ramly Ali FCJ:**The Appeal**

[1] The present appeal before us is against the decision of the Court of Appeal dated 18 January 2012 affirming the decision of the Kuantan High Court dated 2 September 2010 in dismissing the appellant's application to strike out paras. 22-29 of the respondent's statement of claim dated 22 December 2008.

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[2] On 20 March 2014, leave to appeal to the Federal Court was granted on the following (2) questions:

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- (i) whether the test in *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 applies to an application to strike out an action brought to impeach a judgment based on intrinsic fraud or whether a different threshold should be applied; and
- (ii) whether intrinsic fraud including perjured evidence is a ground in which a judgment of a court of competent jurisdiction may be impeached by virtue of s. 44 of the Evidence Act 1950.

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Factual Background

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[3] Since we are dealing here with the question of striking out pleadings under O. 18 r. 19 of the Rules of the High Court 1980 (now the Rules of Court 2012 - the ROC), we do not propose to go into the facts and documents in any more detail than is necessary. In this regard, we only need to trace the basic factual background of the matter that lead to the filing of the striking out application by the appellant.

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[4] The tussle between the parties started when the appellant filed an action against both the respondents on 9 January 2002 at the Kuantan High Court *vide* Civil Suit No MT (1) 21-9-2002 (2002 Suit). The said claim relates to a forest concession of 10,000 acres in Kampung Nenasi, Mukim Bebar, Daerah Pekan, Negeri Pahang awarded to United Malay National Organisation (UMNO) Pahang. The appellant was granted approval by the second respondent to extract timber under the said concession. The appellant claimed that out of the 10,000 acres granted, they only managed to extract timber from an area measuring 7,000 acres, because the second respondent had refused to permit the appellant to do the same from the balance area of 3,000 acres which the appellant claimed to include a portion of virgin forest in which the density of the trees was more intense and hence much more profitable. Instead, the appellant claimed that the second respondent failed or neglected to prevent the extraction of timber by third parties trespassing into the said concession area. As a result of the second respondent's breaches, the appellant claimed to have suffered losses amounted to a sum of RM36,339,030.

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A [5] During trial of the 2002 suit the appellant tendered as evidence a plan (referred to as “the Blue Plan”) of the said area, which the appellant’s witness claimed to have been duly approved by the Pahang State Exco on 5 April 2000. The respondents on the other hand claimed that, based on the records of the State Forestry Department, no approval was granted in respect of the area delineated in the said “Blue Plan”. The respondents also claimed that B the State Forestry Department had only approved the concession area as set out in “the Yellow Plan”, which was the one approved by the Pahang State Exco on 7 January 1998. Subsequently, according to the respondents, the same concession area was re-surveyed, and re-mapped into an area known as C “the Red Plan”.

[6] Unfortunately, the appellant had opted not to call the maker or the licensed surveyor who approved and signed on the “Blue Plan”. Thus the respondents were unable to effectively challenge the validity of the said plan in court.

D [7] After ten days of trial of the 2002 suit, on 25 May 2007 the learned trial judge ruled in favour of the appellant and entered judgment against the respondents whereby the respondents were ordered to pay the appellant a sum of RM37,127,471.60 with interest of 8% per annum from 31 December 2000 until full satisfaction.

E [8] The Court of Appeal on 13 February 2008 dismissed the respondents’ appeal on the ground that the respondents failed to file the records of appeal within the time limited. Hence, the judgment of the High Court was affirmed by the Court of Appeal. The respondents’ application for leave to appeal to the Federal Court was also dismissed on 17 September 2008.

F **The Respondents’ Action To Impeach Earlier Judgment**

[9] Subsequently, on 22 December 2008, the respondents initiated a fresh action against the appellant *vide* the Kuantan High Court Civil Suit No. MT(1)-21-11-2008 to impeach and set aside the earlier judgment of the trial judge dated 25 May 2007 on the premise that the said judgment was entered into as a result of fraud or perjured evidence by the appellant’s witness based on fresh evidence which could not have been obtained and adduced at the earlier trial. The basis of the respondents’ action is as clearly stated in paras. 22-29 of the statement of claim. These are the very paragraphs which the appellant seeks to strike out under O. 18 r. 19 of the ROC (the subject matter of the present appeal before us).

[10] For better under appreciation of the issues in the present appeal, the said paras. 22-29 of the statement of claim are reproduced in full below:

I 22. Premised on the abovementioned, the Plaintiffs have since discovered that the Defendant has deceived the Kuantan High Court in Civil Suit No. MT(2)-21-9-2002 and correspondingly *inter alia* the Defendant’s 1st witness, the said Lee Sin has committed perjury before the Kuantan High Court.

23. The Plaintiffs contend and will contend that the testimony of the Defendant's 1st witness, the said Lee Sin as mentioned in paragraphs 10, 11 and 12 above, were false and untrue. The specific particulars of the perjury committed by the said Lee Sin are *inter alia* as follows:

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(a) that the Defendant had wanted to commence works premised on the 2000 plan but the Forestry Department had instructed them to follow the 1998 plan.

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(b) that plan No. JB-P/P/8044 (P2) with boundary coloured blue as appearing in page 4 of the then Plaintiff's (now Defendant) Bundle of Documents was approved by the State Exco of Pahang on 5 April 2000.

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(c) that plan No. JB-P/P/8044 (P2) with boundary coloured blue as appearing in page 4 of the then Plaintiff's Bundle of Documents (now Defendant) was approved to UMNO Pahang to replace the plan approved to UMNO in 1998.

(d) that in comparing the 2 (two) plans shown in page 5 of the Plaintiff's (now Defendant) Bundle of Documents, the difference is, one was approved by the Pahang State Exco in 1998 and the other approved by the Pahang State Exco to UMNO Pahang in the year 2000.

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(e) that the 1998 plan was amended by the State Exco on 7 April 2000.

(f) that he had knowledge that the new plan was approved by the Pahang State Exco.

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(g) that he did not agree that the concession approved to him was in respect of a parcel owned by UMNO in which has been previously worked on.

24. The Defendant's 1st witness the said Lee Sin at the time when the statements were made in Court knew them to be false and untrue and/or made the statements in the absence of any genuine belief that it is true.

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25. the Plaintiffs contend and will contend that the documents used at the trial by the Defendant were not what they purported to be and correspondingly the trial was tainted with fraud. As a result of the purported evidence led before the Court, the Plaintiffs contend that the Court was deceived into arriving at its findings pertaining to the concession approved by the Pahang State Exco in the year 2000.

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Particulars Of Deceit

(a) Tendering into evidence plan bearing number JB-P/P/8044 (P2) as the plan approved by the Pahang State Exco in the year 2000.

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(b) Withholding from the Kuantan High Court the evidence of the surveyor who prepared plan bearing number JB-P/P/8044(P2)

(c) The presentation of false testimony in Court the particulars of which are as set out in paragraph 23 above.

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(d) Tendering into evidence a comparison of 2 (two) plans as per page 5 of the Plaintiff's (now Defendant) Bundle of Documents.

- A (e) The presentation of evidence before the Kuantan High Court detailing a shortage of 3000 acres of purportedly virgin forest wherein the Defendant was not allowed to extract timber.
- (f) The presentation of evidence of purported trespass inside the parcel delineated by the said blue plan bearing number JB-P/P/8044(P2).

- B (g) The presentation of evidence of purported damage suffered inside the parcel delineated by the said blue plan bearing number JB-P/P/8044(P2).

- C 26. As a result of the purported evidence led before the Court, the Plaintiffs contend that the Court was deceived into arriving at its findings pertaining to the concession approved by the Pahang State Exco in the year 2000. The Plaintiffs contend that this deception had spread to and infected the whole body of the judgment dated 25 May 2007.

- D 27. The Plaintiffs further contend that the facts and evidence pertaining to the actual approval for the concession granted by the Pahang State Exco on 5 April 2000 were not before the Kuantan High Court during the trial at Civil Suit No. MT(2)-21-9-2002.

Discovery of fresh evidence

- E 28. The Plaintiffs contend that the said enclosure 22 in the Pekan District Land Office file number PTP-7-1015 approved by the Pahang State Exco on 5 April 2000 is new evidence that was not available at the material time of the trial of the abovenamed matter.

- F 29. The documents contained in the Pekan District Land Office file number PTP-7-1015 and the minutes of meeting of the Pahang State Exco on 5 April 2000 are evidence of such a character that it would have formed a determining factor in the result of the trial. The said evidence will conclusively determine the actual approval by the Pahang State Exco on 5 April 2000.

- G [11] The appellant filed its statement of defence on 20 February 2009, *inter alia* denying the said paras. 22-29 of the statement of claim and further stated that “the averment of deceit, of false and untrue statements and/or statements made in the absence of genuine belief that it is true, of fraud and of perjury in the statement of claim are based on the same or substantially the same facts which were canvassed before the court in Civil Suit No. MT(2)21-9-2002 thereby making this action scandalous, frivolous, vexatious and an abuse of the process of the court’. (para. 6 of the statement of defence).

- H [12] The appellant further denied “the averments of fresh or new evidence in paras. 28 and 29 and states that such evidence was available and could have been obtained during the trial of Civil Suit No. MT (2) 21-9-2002 if the plaintiffs had exercised reasonable diligence’. (para. 8 of the statement of defence).
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Appellant's Application To Strike Out

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[13] On 6 Mac 2009, the appellant filed an application in encl. 9, to strike out paras. 22-29 of the statement of claim under O. 18 r. 19 of the ROC, substantially on the same grounds as appeared in paras. 6 and 8 of its statement of defence.

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[14] The said application was heard at the Kuantan High Court. On 2 September 2010, it was dismissed with costs. In dismissing the application, the learned judge made, *inter alia*, the following findings:

- (a) that based on the reliefs prayed for by the respondent the issues of *res judicata* or *functus officio* did not arise on the basis of trite law that an application to impeach or set aside a judgment on the ground of fraud can be made by way of a fresh action and the court has the jurisdiction to hear it;
- (b) that an allegation of fraud must be proved by way of evidence to be adduced during trial and if satisfactorily proven, the impugned judgment can be impeached or set aside; and
- (c) that the relevant documents relating to the fraud, as alleged by the respondents, are considered as new or fresh evidence which were not available to the respondent, at the time of the trial of the 2002 suit.

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[15] On appeal, the said decision of the High Court was unanimously affirmed by the Court of Appeal on 18 January 2012. The present appeal before us is against the said decision of the Court of Appeal.

Appellant's Submissions

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[16] In its application to strike out the relevant paras. 22-29 of the statement of claim, the appellant relied on the principle of *res judicata* as found in s. 40 of the Evidence Act 1950 (the Act) and several cited authorities, including the Supreme Court's decision in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783. The appellant relied on the principle as ruled by Peh Swee Chin FCJ in that case where His Lordship stated: "when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation – interest *reipublicae ut sit finis litium*."

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[17] The appellant contended that the exception to *res judicata* as found in s. 44 of the Act, was not applicable in the present case as the respondents failed to bring their case within the exception and therefore the doctrine of *res judicata* applied to bar them from challenging the earlier judgment of the court and consequently the respondents' claim must be struck out.

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- A [18] Relying on the decisions of the Indian Appellate Court in *Mahomed Golab v. Mahomed Sulliman* [1894] ILR 21 Calc 612 and our local High Court in *Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413, the appellant argued that an action to impeach or to set aside a judgment under s. 44 of the Act must fulfil the following elements, namely:
- B (a) the judgment in the earlier action must have been obtained by positive fraud;
- (b) the fraud must be extrinsic, that is to say, the defendant has fraudulently prevented the plaintiff from placing his case effectively before the court that heard the previous suit; and
- C (c) the pleading must contain an explanation as to why the matters alleged could not have been brought forward in the original proceedings; and a pleading that does not set out this element will be struck out as being frivolous and vexatious.
- D [19] That being the case, the appellant contended that in an action to impeach a previous judgment of a court, the respondents (as the plaintiffs) need to pass through a much higher standard. They must satisfy the court that all the above elements have been pleaded in the statement of claim, failing which the claim for such impeachment will be struck out. In the present case,
- E the appellant contended that none of the above elements has been pleaded in the respondents' statement of claim and the threshold has not been met; and that therefore the said paras. 22-29 of the respondents' statement of claim is frivolous, vexatious and an abuse of the process; and therefore should be struck out.
- F [20] Accordingly, the appellant submitted that both the questions posed in this appeal should be answered in the negative and prayed that the appeal be allowed with costs.
- Respondents' Submissions**
- G [21] The respondents, on the other hand submitted that this is not an appropriate case for the said paragraphs in the statement of claim to be struck out under O. 18 r. 19 of the ROC. This is not an "obviously unsustainable" case to be struck out summarily adopting the test as propounded in *Bandar Builder (supra)*.
- H [22] The respondents further submitted that the court has the jurisdiction to impeach or set aside a previous judgement on ground of fraud by way of a fresh action filed by the respondents. Further, such impeachment of the judgment can also be done where there is fresh evidence which could not have been obtained with reasonable diligence to be adduced at the earlier trial. The learned High Court Judge and the Court of Appeal were right in
- I concluding that the principles of *res judicata* and/or *functus officio* did not apply in an impeachment or setting aside application on ground of fraud.

[23] The respondents also submitted that they have meticulously pleaded sufficient particulars of fraud, deceit and perjury practised by the appellant during the earlier trial at the Kuantan High Court, and they should be given their day in court to prove their pleaded case.

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Our Judgment: Principle For Striking Out

B

[24] The appeal before us relates to an application to strike out pleading summarily under O. 18 r. 19 of the ROC on the ground that paras. 22-29 of the respondents' statement of claim are scandalous, frivolous or vexatious, or is an abuse of the process of the court.

[25] The principles for striking out pleadings pursuant to O. 18 r. 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see: *Bandar Builder (supra)*, *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86; *Attorney General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).

C

D

[26] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder (supra)* are, *inter alia* as follows:

E

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '**obviously unsustainable**' (emphasis added);

F

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and

(d) If there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

G

(e) The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

H

[27] The Court of Appeal, in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473, had adopted the well-settled principle of striking out in the following passage

I

A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration.

- A It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial, (see *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court)).

- [28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder (supra)* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie, the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.
- B
- C

- [29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 at p. 407:
- D

... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

- E It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

- This passage was cited with approval by the Privy Council in a Malaysian case of *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212.
- F

Impeachment Of An Earlier Judgment: Section 44 Of The Evidence Act 1950

- [30] The respondents' action in the present case is to impeach or set aside the earlier judgment which was obtained by the appellant against the respondents at the Kuantan High Court on 25 July 2007 on the ground of fraud and/or perjury committed by the appellant's witness during that earlier trial. The claim is by way of a fresh action based on fresh evidence which could not have been obtained at the earlier trial.
- G

- [31] The law recognises this type of cause of action. Section 44 of the Act provides that "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion." This provision is an exception to the doctrine of *res judicata* as provided for under s. 40 of the same Act.
- H
- I

By Way Of A Fresh Action

[32] The impeachment action must be by way a fresh action, not in the same action where the impugned earlier judgment was made. As early as 1935, Whitley J in the Penang High Court case of *Cheah Wong Nyan and Cheah Sin Kee v. KALRM Palaniappa & 2 Ors* [1934] 1 LNS 10; [1935] 1 MLJ 31, relying on English authorities of *Cole v. Langford* [1898] 2 QB 36; *Priestman v. Thomas* [1884] 9 PD 270; *The Duches of Kingston's Case* [1776] 2 Smith's LC (13th edn) 644 and *Patch v. Ward* [1867] LR 3 Ch App 203, ruled that, "The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing."

[33] The same principle was adopted by the Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 where Chang Min Tat FJ ruled that "... if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment"

[34] The case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 is a good example involving an action to set aside an earlier judgment of a court on ground of fraud, and the court dealt with it in a full trial, but not in a summary striking out process. In that case, the Court of Appeal stressed on the requirement that the allegation of fraud must be established by evidence, and affirmed that whether the test has been met in any given case must depend on the facts and circumstances of the particular case and evidence needs to be adduced during trial.

[35] In another case, *Seng Huat Hang Sdn Bhd (supra)* Edgar Joseph Jr J (later FCJ) cited Herring CJ in *McHarg v. Woods, Radio Pty Ltd* [1948] VLR 496, held *inter alia*, that "as in all other actions based on fraud, particulars of the fraud must be exactly given and the allegation established by the strict proof that such a charge requires."

[36] In *Satis Chandra Chatterji and Others v. Kumar Satish Kantha Roy And Others* [1923] AIR PC 73 at p. 76 (as cited in *Chee Pok Choy*), it was also held that "Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them - proved by established facts or inferences legitimately drawn from those facts taken together as a whole.". We must add that proof can only be established by way of evidence during trial.

[37] The appellant relied on Indian cases of *Mahomed Golab (supra)*; and *Muktamala Dasi v. Ram Chandra De And Ors* [1927] AIR Cal 84; and an English decision in *Patch v. Ward (supra)*, to support its contention that the fraud of which s. 44 of the Act speaks refers to an actual fraud and not constructive fraud ie, fraud practiced by the other side must have prevented the respondents from placing their case before the court.

A [38] With respect, we find those authorities cited above are of no help to the appellant's case before us. In all those cases, the decisions of the respective courts were made after full trial of the actions to set aside earlier judgments, and not summarily by striking out process. The applicants in those cases were given their chance to prove their claims of fraud obtained in the earlier judgements by way of trial. In our case, we have not reached that stage yet. The action is still at the early stage where the appellant applied to strike out the respondents' statement of claim under O. 18 r. 19 of the ROC.

C [39] Our view is that the fraud of which s. 44 of the Act speaks refers to an actual fraud and not constructive fraud ie, fraud practised by the other side must have prevented the respondents from placing their case before the court.

D [40] The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the decree by the contrivance. (see: *Patch v. Word (supra)*).

[41] The earlier judgment cannot be impeached or set aside on a mere general allegation of fraud. It must be shown with sufficient details how, when, where and in what way the alleged fraud was committed.

"Extrinsic Fraud" And "Intrinsic Fraud"

E [42] The appellant also argued that in order to bring the action within the provisions of s. 44 of the Act, the respondents must show that the alleged fraud is in the nature of "extrinsic fraud" as opposed to "intrinsic fraud".

F [43] In the *Major Law Lexicon* (4th edn, 2010), "intrinsic fraud" refers to that fraud which occurs within the framework of actual conduct of trial and pertains to and affects determination of issues presented therein, and it may be accomplished by perjury, or by use of false or forged instruments or by concealment or misrepresentation of evidence; while "extrinsic fraud" refers to fraud which is collateral to the issues tried in the case wherein the judgment was rendered ie, a fraud the effect of which prevents a party from having a trial or from presenting all of his case to the court or has so affected the manner in which the judgment was taken that there has not been a fair submission of the controversy to the court.

H [44] In *Cheah Wong Nyan & Cheah Sin Kee (supra)*; Whitley J adopted Sir William de Grey and Lord Walsingham opinion in *The Duchess of Kingston (supra)* on the principle that "fraud is an intrinsic collateral act which vitiates the most solemn proceedings of Court of Justice". This principle was accepted and adopted by the Court of Appeal in *Chee Pok Choy (supra)*. We are of the view that the issue as to whether the fraud is in the form of intrinsic or extrinsic is factual-based and can only be determined at trial. The question as to whether the fraud referred to in s. 44 of the Act speaks about "intrinsic or extrinsic" fraud is an issue of law that requires lengthy argument and

mature consideration at trial. It is no part of the court's function at this stage of the litigation to decide difficult question of law which call for detailed argument and mature considerations (see: *American Cyanamid Co (supra)*).

[45] In *Wyatt v. Palmer* [1899] 2 QB 106 the English Court of Appeal dealt with an application to strike out an earlier judgment on the ground of fraud. Lindley MR in that case concluded that "This is not a case in which the action ought to be summarily stopped ... As a general proposition I think it is dangerous and undesirable to summarily stop an action to set aside a judgment on the ground that it has been obtained by fraud."

New Evidence

[46] The respondents in the present case relied on the issue of new evidence in the form of encl. 22 in the Pekan District Land Office file No. PTP-7-1015 approved by the Pahang State Exco on 5 April 2000, which they claimed was not available at the earlier trial of the matter at the Kuantan High Court. The respondents claimed that the said file in question concerned the actual approved plan by the Pahang State Exco relating to the areas in dispute which was seized by the Anti-Corruption Agency for their investigation, and this was not available at the time the respondents were preparing the case for trial.

[47] Applying the principle as laid down in *Ladd v. Marshall* [1954] 3 All ER 745, the respondents (citing para. 561 of *Halsbury's Laws of England* (4th edn) vol. 26) submitted that

an action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court. It must be present:

- (a) that the evidence could not have been obtained with reasonable diligence for use at trial;
- (b) that the further evidence is such that, if given would have an important influence on the result of the trial, although it need not be decisive; and
- (c) that the evidence is such as is presumably to be believed.

[48] At this stage of the proceedings, we are satisfied that the respondents' statements of claim, particularly paras. 22-29 thereof have complied with the basic requirements or elements, on the issue of new evidence as listed above. However, whether the said evidence could or could not be obtained with reasonable diligence, whether it would have an important influence on the result of the trial, and whether it is presumably to be believed, are purely questions of facts which can only be determined at full trial where witnesses can be called to testify and be cross-examined to establish the truth, but not by way of affidavits evidence at the stage of summary proceedings of striking out under O. 18 r. 19 of the ROC as applied for by the appellant.

- A [49] The appellant also relied on the case of *Birch v. Birch* [1902] P 130 which was earlier quoted by Edgar Joseph Jr J in *Seng Huat Hang (supra)* in which His Lordship held that “... there must be a suggestion in the statement of claim, if it (sic) is to escape being struck out as being frivolous and vexatious, of such facts only discovered since the trial, as if proved, would
B render it reasonably probable that the judgment would be upset, though the facts suggested need not necessarily be such as would have been evidence at the trial”.

Res Judicata

- C [50] The appellant raised the issue of *res judicata* and submitted that the doctrine applied in present case to bar the respondent from challenging the earlier judgment.

- D [51] On this issue, the Court of Appeal in *Chee Pok Choy (supra)* had the opportunity to deal with the doctrine in an action to impeach or set aside an earlier judgment. In that case, the court elaborated on the provisions of s. 44 of the Act and the scope and application of doctrine of *res judicata*. One of the issues determined in that case was whether the decision of the Supreme Court in an earlier judgment, as a matter of law precludes the appellants from seeking to set aside the judgment.

- E [52] The Court of Appeal (in that case) concluded that, “since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to unjust result”.

- F [53] The Court of Appeal further ruled that “... it would be an affront to justice to permit the respondent to successfully plead *res judicata* in the second suit as that would tantamount to applying the editorial blue pencil across the mandatory provisions of s. 260(2) of the Code.”

- G [54] For that reason, the Court of Appeal resolved the issue in the appellants’ favour to the effect that the earlier judgment in question does not operate to bar the appellants from making an application to challenge and to set aside the said earlier judgment.

[55] Consequently, we hold that the doctrine of *res judicata* is not applicable in an action to impeach or to set aside an earlier judgment which has been obtained by fraud.

H **Conclusion**

- I [56] In the present case, looking at the pleadings and the lengthy affidavits with various documentary exhibits filed by the parties, we find that there is serious conflict on material facts particularly relating to issues on the existence of fraud (be it extrinsic or intrinsic), and whether the fresh evidence could not have been obtained with reasonable diligence to be adduced during the previous trial. This conflict can only be resolved by subjecting the

deponents of the various affidavits to cross-examination and/or calling other witnesses whose evidence can only be evaluated by the court after seeing and hearing them.

[57] We are satisfied that paras. 22-29 of the respondents' statements of claim have sufficiently pleaded all the relevant particulars or elements to set for trial an action to impeach or set aside the earlier judgment as stated earlier either on the ground of fraud or on the ground of fresh/new evidence. The action is based on a valid cause of action recognised by law. Therefore, the respondents' action as well as the issue of fraud as pleaded therein, cannot be said to be frivolous, vexatious and an abuse of the process of the court.

[58] The "obviously unsustainable" test as adopted by in *Bandar Builder (supra)*, would ensure fair trial and access to the court to litigants. The respondents (the plaintiffs) should be given their day in court to prove their case. The court should not strike out an action purely or for the simple reason that it is "unsustainable". The degree of "unsustainability" must be higher, ie, it must be "obviously unsustainable" before the action can be struck out summarily. The court should not pull its shutter down and close its door to the respondents, by striking out their action summarily. The tests as adopted in *Bandar Builder (supra)* must be applicable across the board, including action grounded on fraud, as in the case before us. The learned High Court Judge and the Court of Appeal were right in holding that the respondents' action is not obviously unsustainable and dismissed the appellant's application for striking out.

[59] Based on the reasons adumbrated above, we would answer both the questions posed to us as follows:

- (a) Question 1 – the answer is in the affirmative ie, the test in *Bandar Builder (supra)* applies to an application to strike out an action to impeach a judgment based on intrinsic fraud; and
- (b) Question 2 – the answer is also in the affirmative ie, intrinsic fraud (including perjured evidence), if established by evidence at trial, is a ground on which a judgment of a court of competent jurisdiction may be impeached by virtue of s. 44 of the Act.

[60] In the upshot, we dismiss the appeal with costs and uphold the decisions of the High Court and the Court of Appeal.

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